

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

LAMBDA OPTICAL SOLUTIONS, LLC,

: CIVIL ACTION

Plaintiff,

v.

ALCATEL-LUCENT SA, et al.,

Defendants.

ALCATEL-LUCENT USA, INC. and :

ALCATEL-LUCENT HOLDINGS, INC., :

Counter-claimants, :

v.

LAMBDA OPTICAL SOLUTIONS, LLC; :

LAMBDA OPTICAL SYSTEMS CORP.; :

and ANASTASIOS TZATHAS, :

: NO. 10-487-LPS

Counter-defendants.

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Wilmington, Delaware
Thursday, November 3, 2011
Oral Argument Hearing

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BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

APPEARANCES:

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ASHBY & GEDDES, P.A.

BY: STEPHEN J. BALICK, ESQ., and
ANDREW C. MAYO, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

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15 P R O C E E D I N G S

16 (REPORTER'S NOTE: The following oral argument
17 hearing took place in open court, beginning at 10:02 a.m.)

18 THE COURT: Good morning, everyone.

19 (The attorneys respond, "Good morning, your
20 Honor.")

21 THE COURT: Let's start by putting your
22 appearances on the record, please.

23 MR. O'KELLY: Good morning, your Honor. Sean
24 O'Kelly on behalf of Anastasios Tzathas.

25 MR. BALICK: Your Honor, good morning.

1 THE COURT: Good morning.

2 MR. BALICK: Steven Balick for Lambda from Ashby
3 & Geddes. Also, my colleague Andrew Mayo is with us today,
4 and Victor Felix from the Procopio firm in San Diego.

5 MR. FELIX: Good morning.

6 THE COURT: Good morning.

7 MR. SHAW: Good morning, your Honor. John Shaw
8 from Shaw Keller for the Alcatel-Lucent, SA parties. With
9 me is Sasha Rao and Todd Simpson from Ropes & Gray.

10 THE COURT: Welcome.

11 MS. JACOBS LOUDEN: Good morning, your Honor.
12 Karen Jacobs Louden from Morris Nichols. I'm here for Cisco
13 and Tellabs.

14 THE COURT: Good morning.

15 MR. MOYER: Good morning, your Honor. Jeff
16 Moyer from Richards Layton on behalf of Nokia Siemens
17 Network. I have with me my co-counsel, Allison Altersohn
18 from the King & Spalding firm.

19 THE COURT: Okay. Welcome.

20 MR. HORWITZ: Good morning, your Honor. Richard
21 Horwitz from Potter Anderson & Corroon. I'm here for
22 Fujitsu.

23 THE COURT: All right. Well, welcome again to
24 everyone. We are here for two purposes this morning.
25 First, and primarily, is the motion to dismiss Mr. Tzathas;

1 hopefully, I have that close to accurate; and then we're
2 also going to talk about scheduling, but I do want to hear
3 argument on the motion first, so we will hear that. And I
4 will let you pronounce your client's name.

5 MR. O'KELLY: Thank you, your Honor. Again,
6 Sean O'Kelly from O'Kelly, Ernst, Bielli & Wallen on behalf
7 of Anastasios Tzathas.

8 Your Honor, may it please the Court, Mr. Tzathas
9 has obviously moved to dismiss the counterclaims filed
10 against him for lack of jurisdiction. Procedurally,
11 Mr. Tzathas came to this case as a counterclaim defendant.
12 The underlying case is a patent infringement case brought
13 by Lambda against Alcatel. The claims can be broke out
14 into two categories. There are four claims against him,
15 individually for alleged breach of various duties,
16 contractual and otherwise, and three as a joint tort-feasor
17 with Lambda.

18 Your Honor, my comments will be brief.
19 Alcatel-Lucent asserts there are two bases for personal
20 jurisdiction. I'll address the long-arm statute first and
21 then the assertion under Rule 4(k)(1)(B) that there is
22 personal jurisdiction.

23 Obviously we dispute both.

24 Your Honor, as to the long-arm statute, the
25 position endorsed an opinion by Judge Farnan is instructive.

1 Alcatel-Lucent, as we've disputed personal jurisdiction,
2 Alcatel-Lucent has to meet two requirements. The first is
3 that Mr. Tzathas falls within the long-arm statute, the
4 other is that his constitutional rights are being subverted.

5 Under the long-arm statute, none of the six
6 sections of 10 Del Code 3104 apply.

7 I'll refer your Honor to the declaration, but in
8 particular, Mr. Tzathas is a resident of Maryland. He
9 worked in New Jersey. He has no contacts with Delaware
10 whatsoever. He has never worked here. He has never lived
11 here. He doesn't own property. He doesn't transact
12 business. He has never performed work.

13 Those are the rough corners of 3104, the facts
14 that apply in this instance.

15 For Alcatel's part, they asserted Mr. Tzathas --
16 (The Court sneezes.)

17 MR. O'KELLY: Bless you.

18 THE COURT: Thank you.

19 MR. O'KELLY: Alcatel-Lucent for their part
20 asserts Mr. Tzathas incorporated the predecessor to Lambda,
21 Princeton Optical. Not to put too fine a point on that.
22 That is just factually wrong. We submitted documents to
23 support that and, therefore, to the extent that their
24 jurisdictional analysis relies on that, Your Honor, we
25 dispute that. And we submitted, of course, affidavits and

1 supporting documents to that effect.

2 He did not incorporate Princeton Optical. In
3 fact, he didn't begin working there until six months after
4 it had been incorporated. He had been working at Lucent at
5 that time.

6 To the extent, your Honor, that they assert that
7 there is jurisdiction on alter-ego basis, again, that is
8 factually just wrong. Again, not putting too fine a point
9 on it. He didn't own any entity. He wasn't controlling any
10 entity. And, in fact, he didn't own stock.

11 The point is that Alcatel-Lucent failed to, in
12 any event, assert any fraud or injustice or inequity, even
13 assuming there was a viable alter-ego claim as required
14 under *CNH America*. Therefore, as to the Delaware long-arm
15 statute, we assert there is no personal jurisdiction.

16 THE COURT: Under the Delaware long-arm statute,
17 why should I not give them jurisdictional discovery into
18 inquire into the things you asserted?

19 MR. O'KELLY: That is fair, your Honor.

20 Our position, your Honor, is that we have
21 actually given them discovery in the form of multiple
22 affidavits, one in our opening and one in our reply brief
23 and additional rebuttal documents, documents that I think
24 fairly point out in fact that their contentions are
25 misapplied or a misapprehension of fact. So the discovery,

1 we would submit, your Honor, has already been tendered to
2 them.

3 Your Honor, finishing out the first element, the
4 constitutional due process. *International Shoe* requires
5 minimal contacts. Again, *Physician Endorsed* as applied by
6 Judge Farnan I think stands squarely on the notion that
7 personal jurisdiction in this instance doesn't apply.

8 With regard to Rule 4(k)(1)(B), your Honor,
9 certainly we don't dispute the 100-mile rule. We concede
10 that he I believe is 96 miles away and, certainly, the
11 Internet doesn't lie.

12 That is important in fact for later on, obviously,
13 because Mr. Tzathas, while we assert he is not subject to
14 personal jurisdiction, he is subject to Rule 45 subpoena
15 service. Presumably, that would be available to Alcatel-Lucent
16 in the event they choose to take his deposition as to facts
17 they consider material in this action; the underlying
18 action, of course, being the patent infringement action.

19 Aside from that, though, your Honor, Alcatel-Lucent
20 asserts Mr. Tzathas is a necessary party. Now, the reasons
21 they tender for that is manifold but I'll march through them
22 to the extent I can in some order.

23 Obviously, complete relief is something they
24 complain would be impeded.

25 That there would be increased legal expense,

1 duplicative lawsuits, inconsistent adjudication, alter-ego
2 theory.

3 Beginning with the last first. Obviously, I
4 have addressed the alterego theory. That is just wrong on
5 the facts.

6 Complete relief.

7 Your Honor, I'll point to the counterclaims,
8 paragraphs 16-37 tendered by Alcatel-Lucent where in fact
9 they say that there are other people who worked at
10 Alcatel-Lucent who signed confidential agreements and then
11 left and went to work at Lambda other than Mr. Tzathas.
12 None of the folks have been called to appear named as
13 defendants.

14 The argument would then be by their analysis if
15 Mr. Tzathas is required to be here, so are all these other
16 folks. We, of course, dispute that.

17 With regard to duplicative lawsuit, the
18 lawsuits, I guess your Honor I would point to no further
19 than the scheduling order that has been tendered in this
20 matter. I think you will see and I can make the point that
21 what, in fact, we're seeing are in fact two different
22 lawsuits. The scheduling order carves out different
23 schedules, different requirements, different obligations,
24 depending on the allegations asserted. In fact, the
25 argument that what is larded on top of the typical patent

1 scheduling order is in fact the civil complaints that are
2 asserted against Lambda and against my client.

3 A not insignificant fact, your Honor, in
4 *Multimedia Games*, joint tort feasons are not considered
5 necessary parties. That is something that needs to be
6 certainly embraced in this instance at least as to three
7 of the seven counts against my client.

8 The last point, your Honor, with regard to
9 inconsistent obligations.

10 The point that was raised in Alcatel-Lucent
11 papers relates to inconsistent adjudications. That is, in
12 fact, not the standard. Inconsistent adjudications, for
13 example, if they were called upon to defend an infringement
14 suit here and then required to file a civil against
15 Mr. Tzathas in another jurisdiction, that is an argument
16 there could be incomplete or inconsistent adjudications;
17 and it's fairly clear, your Honor, under the law that is
18 actually not a basis for finding that there should be
19 personal jurisdiction when there is none.

20 Importantly, and more as a wrap-up, your Honor,
21 again, I mentioned the subpoena power that still exists.
22 The 100-mile rule still applies, Rule 45. And, importantly,
23 Alcatel-Lucent is not being denied a defense by his absence.

24 Thank you, your Honor.

25 THE COURT: If I reach the necessary party

1 analysis, is that a discretionary decision, or assuming I
2 agree with you on the points that you have made, do I have
3 discretion to join him nonetheless or I don't?

4 MR. O'KELLY: Your Honor, I think the analysis
5 of the facts is reviewed by the Court. The standard as I
6 understand it is discretionary but in view of the facts as
7 submitted.

8 THE COURT: Okay.

9 MR. O'KELLY: Thank you, your Honor.

10 THE COURT: Thank you.

11 MS. RAO: Good morning, your Honor.

12 THE COURT: Good morning.

13 MS. RAO: Sasha Rao with Ropes & Gray on behalf
14 of Alcatel-Lucent.

15 May it please the Court, nothing is more
16 fundamental to a patent infringement lawsuit than the
17 ownership of the patent in suit. And, the patentee is
18 required to make a showing of ownership in order to proceed
19 with the patent infringement lawsuit.

20 Here, the '229 patent that is the subject of
21 this lawsuit lists Tzathas as a named inventor. Mr. Tzathas
22 assigned it to a Delaware corporation called Princeton
23 Optical Systems. That is the predecessor in interest to
24 Lambda Optical Systems Corp., the patentee. And, this
25 lawsuit has been brought by a different entity called Lambda

1 Optical Solutions, LLC that purports to be the exclusive
2 licensee of the patent in suit.

3 So there are two independent reasons for your
4 Honor to find that Mr. Tzathas is subject to personal
5 jurisdiction here.

6 The first is that he is a necessary party
7 under Rule 19 and he was properly served. And,

8 The second reason is that exercise of
9 jurisdiction is proper under the Delaware long-arm statute.

10 I'm going to be addressing the first reason that
11 he is a necessary party, and my colleague Mr. Shaw will be
12 addressing the Delaware long-arm statute.

13 Now, Mr. Tzathas is a necessary party to decide
14 the issue of the ownership of the '229 patent because a
15 number of the counterclaims are directed at precisely that
16 issue. Mr. Tzathas, while he was employed at Lucent, signed
17 an employee assignment agreement of intellectual property,
18 and Alcatel-Lucent contends that the inventions claimed in
19 the '229 patent is beneficially owned by Alcatel owned by
20 Alcatel-Lucent and is subject to a contractual duty by
21 Mr. Tzathas to assign this patent to Alcatel-Lucent.

22 So this issue of ownership is what the seven
23 counts against Mr. Tzathas are directed to. Four of them
24 are just to Mr. Tzathas alone, not with anybody else.

25 So Rule 19(a) says, a person who is subject to

1 service of process and whose joinder will not deprive the
2 Court of subject matter jurisdiction must be joined as a
3 party if:

4 the Court cannot afford complete relief among
5 the existing parties; or

6 that person claims an interest relating to the
7 subject of the action and is so situated that disposing of
8 the action in the person's absence may:

9 leave an existing party subject to a substantial
10 risk of incurring double, multiple or otherwise inconsistent
11 obligations because of the interest.

12 Now, the advisory committee rules to this rule
13 say, one of the things it says is that the interest that are
14 being furthered here are not only those of the parties but
15 also that of the public in avoiding repeated lawsuits on the
16 same essential subject matter.

17 So the subject matter of the counterclaims
18 that Mr. Tzathas's attorney would like us to prosecute in a
19 separate action deal with the ownership of the patent in
20 suit, and that would be precisely the same subject matter
21 that this Court would also have to adjudicate.

22 If Alcatel-Lucent owned the patents in suit,
23 then it can't be sued for infringement of its own patent.

24 Alcatel-Lucent should not be put in this
25 position. This leads to inconsistent obligations and will

1 will lead to essentially to two separate lawsuits on the
2 same subject matter.

3 THE COURT: So, in your view, the Court has
4 to resolve the ownership dispute as part of this case
5 regardless of whether he is in the case or not?

6 MS. RAO: That's correct, your Honor. And any
7 relief Lambda seeks in this case would be inconsistent with
8 the beneficiary ownership issues.

9 So because Mr. Tzathas is necessary to the
10 ownership issues in this case, which permeate all the
11 counterclaims against him, and if the Court is persuaded
12 that he is a necessary party, then the issue of jurisdiction
13 under Delaware's long-arm statute is moot.

14 My colleague, Mr. Shaw will address the Delaware
15 long-arm statute.

16 THE COURT: Thank you.

17 MR. SHAW: Good morning again, your Honor.

18 Even accepting what Mr. Tzathas has put in the
19 record through his declarations, there is enough now to at
20 least get the jurisdictional discovery and perhaps to keep
21 him in the court on jurisdictional grounds.

22 There are two things. One we talked about in
23 our answering brief, and the other actually appeared in his
24 reply brief declaration.

25 First, we have what appears to be his statement

1 from 2004 that he was a co-founder of Princeton Networks.
2 We don't know precisely what that means, and that is one of
3 the main purposes of the jurisdictional discovery here.
4 But typically cofounders are not simply employees, as
5 Mr. Tzathas tries to portray himself in his declarations.

6 We know that through the print we originally
7 pulled through Lexus, but we also went back on the way-back
8 machine and found an original website from 2004, from Dorsal
9 Networks that has the same text. It's verbatim in the
10 Lexus.

11 The other component is from the reply brief, as
12 I mentioned. In that one, there is a statement. It's in
13 paragraph 4 of the declaration, and this is docket item 104.
14 Mr. Tzathas wrote that he was approached by Moon W. Kim, who
15 apparently was the other founder of Princeton Networks, to
16 work for Princeton Networks some time in the spring of 2000.
17 That is a fact we didn't know and wouldn't know unless he
18 put it here and the kind of thing we would want to learn in
19 jurisdictional discovery.

20 In the spring of 2000, he is still working for
21 Lucent at that point isn't time. It's unclear the month or
22 exactly when it happened but it is around the formation of
23 the entity; and then, of course, we know later in time he
24 describes himself as a co-founder. So there is at least two
25 indications we have now that he was integrally involved in

1 the formation of the Princeton Networks entity.

2 How does that fit into personal jurisdiction?

3 Long-arm statute (c)(1), (c)(3), the subsections, both deal
4 with and can be implicated by transacting business in
5 Delaware, for example, creating a Delaware entity that is
6 at the core of the conduct that is complained of in the
7 counterclaims.

8 It's also not just the formation. If you look
9 through Mr. Tzathas's declaration, there were a series of
10 activities with that entity under Delaware corporate law
11 that changed the entity. Each of those are also a contact
12 with Delaware, a transaction within the state, by the
13 entity that took assignment of Mr. Tzathas's patent which
14 Alcatel-Lucent is making the allegations about in the
15 counterclaims.

16 The other component comes from the, again, reply
17 declaration. If indeed it was the case that Mr. Tzathas and
18 Mr. Kim were working on forming Princeton Networks while he
19 is at Lucent, and whether or not Mr. Tzathas participated
20 directly himself in creating the Delaware entities, the key
21 falls within the conspiracy theory of jurisdiction because
22 the Delaware entity again is the single act within the state
23 in furtherance of the claims that are at issue.

24 That's all I have.

25 THE COURT: All right. Thank you very much.

1 Any rebuttal?

2 MR. O'KELLY: Just briefly, your Honor.

3 Your Honor, to the extent I understood the
4 argument, I think the record is clear in fact that Mr. Tzathas
5 was not involved in the incorporation of Princeton Networks.
6 In fact, the submission that in 2004 he was somehow involved
7 doesn't comport with either our pleadings or the affidavits
8 when, in fact, he left in May of 2001.

9 With regard to contacts with Delaware, I think I
10 understood, and, of course, I dispute, that actions taken by
11 companies, even assuming Mr. Tzathas was at those companies,
12 somehow comports with the contact by him in Delaware. I
13 dispute that. I'm not sure that is in line with the law.

14 What remains, though, with regard to the issue of
15 ownership, those are issues that remain whether Mr. Tzathas is
16 involved in the action as an individual defendant or not. He
17 can be deposed as a co-inventor. He can be subpoenaed with
18 regard to facts related to his work previously. Presumably,
19 there are other folks they are going to reach out and take
20 the depositions of that are not named individually in this
21 suit as I mentioned. They, in fact, admit as much in their
22 counterclaims.

23 Thank you, your Honor.

24 THE COURT: Is there any chance that he is going
25 to assert an ownership interest?

1 MR. O'KELLY: I'm not sure there would be. He
2 assigned those, so as an effective matter, he doesn't have
3 an ownership interest.

4 THE COURT: I'll give you a chance to talk when
5 he is done. Don't worry.

6 (Ms. Rao sits back down.)

7 THE COURT: Why should I or, more importantly,
8 why should Alcatel-Lucent, why should we take any risk that
9 ownership issues won't be completely resolved when the Court
10 and parties are already going to be looking at that, so why
11 not view him as a necessary party?

12 MR. O'KELLY: Sure. I think the analysis with
13 regard to the long-arm statute and, obviously, the Fourteenth
14 Amendment compel us to look I think fairly stringently as
15 joining people for some other reason. The analysis sets forth
16 the distinction between folks that are involved and submitting
17 to personal jurisdiction.

18 THE COURT: Under the 4(k)(1), where does the
19 due process clause come in?

20 MR. O'KELLY: Well, your Honor, I think the
21 case law recognizes that there is -- there is a two-part
22 analysis. In fact, in *Physicians Endorsed*, Judge Farnan
23 called it out and said you look at, in this instance, 10 Del
24 Code 3104, and at the second part of the analysis, you make
25 sure, according to the standards set forth in *International*

1 *Shoe*, that there are minimum contacts such that it comports
2 with traditional notions of fair play and substantial
3 justice.

4 THE COURT: Do you disagree that if the
5 requirements of 4(k)(1) are satisfied, that the Court then
6 has personal jurisdiction over your client and doesn't
7 even need to even reach the long-arm statute? That is,
8 Alcatel-Lucent is arguing there are two separate bases, as I
9 understand it. Do you disagree with that as a theoretical
10 notion?

11 MR. O'KELLY: I'm not sure I understand the
12 question. To the extent I understand it, if we're within
13 4(k)(1), either (A) or (B), yes, I would concede there is
14 personal jurisdiction, to the extent I understand the
15 question. Yes.

16 THE COURT: Well, they have argued to me, if I
17 understand them, that Ms. Rao has asserted a basis for
18 exercising jurisdiction over your client. If I agree with
19 her, I don't need to get to Mr. Shaw's issues which are
20 long-arm statute and due process clause. I know you don't
21 agree that they met their burden on any of them, but if I
22 agree Ms. Rao has met her burden, do I need to get to
23 Mr. Shaw's issues?

24 MR. O'KELLY: I understand. I'm not sure I
25 agree with that. I think you pass through -- you pass

1 through 3104 and then get to -- I don't have the rule in
2 front of me but as I recall the rule, I think it requires
3 that there be jurisdiction under the long-arm statute and
4 that it comports with Rule 19, as I understand the rule.

5 THE COURT: Okay. Is there anything else?

6 MR. O'KELLY: No, your Honor. Thank you.

7 THE COURT: Ms. Rao, did you want to add
8 something?

9 MS. RAO: Just briefly, your Honor.

10 The question you asked counsel for Mr. Tzathas,
11 is he planning to assert ownership. Well, he already has.
12 By assigning the invention to Princeton Optical Networks, he
13 exercised his ownership right which we contend was ours. It
14 was not his to begin with.

15 So that's all I wanted to say, your Honor.

16 THE COURT: And what about, did I misunderstand
17 your position that, with all due respect to Mr. Shaw, I can
18 ignore him if I rule with respect to you?

19 MS. RAO: That's correct. That is exactly our
20 position.

21 THE COURT: Is there a due process analysis I
22 have to undertake?

23 MS. RAO: I don't believe so, your Honor.

24 THE COURT: Thank you.

25 Mr. Shaw, is there anything you want to add?

1 MR. SHAW: Nothing, your Honor.

2 THE COURT: Let's talk about the scheduling
3 order. Whomever on the plaintiff's side wishes to address
4 it can go first. It looked like there are only a couple of
5 disputes.

6 MR. FELIX: Good morning, your Honor. Victor
7 Felix for the Lambda entities. May it please the court.

8 I just want to start with the first dispute.
9 You are correct, there are two disputes that are left in the
10 scheduling order.

11 We have a disagreement as to whether
12 infringement and invalidity contentions should be made part
13 of the scheduling order in this case.

14 I'll start by saying that the norm in Delaware
15 is not to have contentions. What the defendants are asking
16 to do is to deviate from those norms.

17 Just so you understand what is going on here,
18 the defendants' goal is not to try and streamline the case
19 or simplify issues. What their true goal is to basically
20 get the plaintiff to give them an early disclosure of the
21 infringement contentions as to what products infringe and
22 which manner they do so based on the limited availability of
23 public information that is available to us at this point in
24 the case.

25 With those contentions in place, the goal then

1 is to deny us discovery to just the disclosures that are
2 made in those contentions.

3 We've had this issue before with opposing
4 counsel in other jurisdictions that do have local patent
5 rules. That that is exactly what happens. We disclose
6 infringement contentions based on local patent rules. Then
7 discovery proceeds.

8 We asked for source code, for example. This
9 particular case involves software. What happens is when we
10 get to a point of asking for source code, we get limited in
11 terms of what the contentions are. So if your contentions
12 don't implicate some other part of the source code or
13 software, they won't give it to you, basically arguing that
14 that is not part of the contentions, that is not an issue
15 that is in place in the case because they're not disclosed
16 or it's not implicated by the infringement contentions.

17 I think, your Honor, once you file a lawsuit that
18 meets Rule 11 that we've done our due diligence and have a
19 basis to bring this case in front of your Honor, that we have
20 the right to do the discovery that we need to do to identify
21 any product or any means in which infringement takes place
22 and not be limited by some early disclosure of infringement
23 contentions where we don't have the opportunity to look at
24 source code, where the defendants basically are in control
25 of all of the information before we're able to prepare those

1 contentions.

2 THE COURT: I'm sure you know I have a procedure
3 for resolving discovery disputes. So let's say theoretically
4 the defendants stand up and say that is not what they're
5 trying to do, and I make you do preliminary contentions
6 subject to supplementation, and then you ask to see source
7 code, and they give you only a limited amount, and then we
8 have a discovery dispute because you want to see more of it
9 and not be limited to what you put in your preliminary
10 contentions.

11 Why can't I just deal with it at that point in
12 the discovery process?

13 MR. FELIX: Well, your Honor, I don't think there
14 is any more burden to do this by sending interrogatories,
15 asking what our contentions are. We would still be obligated
16 to supplement those interrogatories. So there is no added
17 burden to the defendants to get that information through
18 discovery in terms of the contentions.

19 The problem is that these contentions are being
20 used to deny us the ability to get that discovery. We have
21 had that dispute before, in fact, with a firm that is here
22 representing another party, where we went through that
23 process, we had motions to compel, and because the Court's
24 docket was very busy, it couldn't rule on the motion to
25 compel, but in the meantime we get a motion for summary

1 judgment based on those contentions, and now we're in the
2 Court of Appeals arguing those very issues.

3 So, you know, really at the end of the case here
4 what we're trying to do is just get to the truth, and so we
5 fear that if we start implementing these contentions, they
6 are more burdensome to us than they are on them. Only
7 because we need to get information from them to be able to
8 determine how these products infringe, which products
9 infringe, we are going to need discovery from them.

10 On the other hand, we have defendants who have
11 to supply invalidity contentions which are based on public
12 information. They don't need anything from us in terms of
13 being able to develop and prepare their invalidity contentions.

14 If anything, the one piece of infringement that
15 they need from us is date of conception, a priority date,
16 that again they can get that through discovery. And,

17 Let's not forget that at the end of the case, this
18 is going to end up having res judicata effect that whatever
19 the judge determines, there will be res judicata, so we will
20 be prevented from ever bringing a claim that was asserted or
21 could have been asserted. They're really setting up this case
22 to basically limit our ability to be able to discover what
23 other products are implicated in terms of infringement and
24 what means of infringement are there.

25 That's it, your Honor.

1 THE COURT: Did you want to address the other
2 issue?

3 MR. FELIX: Sure. The other issue is, your
4 Honor, the requirement that the defendants file a single
5 motion for summary judgment on invalidity and/or unenforce-
6 ability.

7 We don't think it's any burden on defendants to
8 coordinate that particular motion because prior art is going
9 to be -- those issues are going to be coming for all types
10 of defendants.

11 Now, we recognize there may be issues that may
12 be unique to each defendant but when it comes to invalidity
13 or unenforceability, I think it would just be a big waste
14 of time to have multiple motions on invalidity or unenforce-
15 ability when those issues are common to all defendants.

16 THE COURT: Okay. Thank you.

17 MR. FELIX: Thank you.

18 MR. SHAW: Good morning again, your Honor.

19 On the contention issue, I think the best way to
20 phrase it is the provision that the defendants have proposed
21 essentially codifies what is supposed to be the common law
22 rule here in Delaware as to how the contentions get answered.
23 If you sat a bunch of lawyers and practitioners down in a
24 room without the cases sitting here and said write it out,
25 you would get pretty much our provision.

1 The question is why put it in the order. The
2 answer to that is twofold. First, we're seeing that in
3 multiple defendant cases. Judge Robinson did something
4 like that on her *Walker Digital* cases or something similar
5 to this, asking the plaintiffs to come out with initial
6 contentions, followed by invalidity contentions, and the
7 rationale is pretty straightforward.

8 If you don't do that, as a practical matter, not
9 in every case, and I'm not saying the plaintiffs here would
10 be in this position, but the contentions come back pretty
11 thin and you enter into a pretty lengthy meet and confer
12 process which is pretty expensive. It's a difficult issue
13 to present to your Honor because it's hard for you to gauge,
14 sitting there, looking at responses, how detailed they are,
15 how detailed they aren't. And,

16 The provision that we're proposing is simply
17 put down on the table what it is you know and when you know
18 it. And then the reasonable and seasonable -- subject to
19 reasonable and timely amendment statements at the bottom of
20 the page is what Rule 26(e) is. So that is pretty much the
21 position for us.

22 There are a couple details that come beyond
23 that. For example, Cisco has no models identified so they
24 don't know what they would be focusing on or even how to
25 frame their invalidity contentions. And on the invalidity

1 contention front, that is another issue that comes up as the
2 discovery goes on.

3 Typically, if a plaintiff only gets contentions
4 on independent claims, we're only going to do contentions on
5 independent claims, and then at the end of the discovery
6 schedule, there is a big brouhaha about adding contentions,
7 adding products, and that spills down into the process for
8 you potentially later.

9 On the second point on case dispositive motions,
10 just two things to say.

11 One, we're very early in the case. We don't know
12 what positions people will be taking, and it is possible for
13 defendants to have different invalidity positions. And you
14 have seen claim construction arguments I'm sure where some
15 defendants had different views on the construction of the
16 claim terms than other defendants, and that, of course, will
17 play out as their invalidity positions and infringement
18 contentions in the case.

19 The second is everyone in this room is a repeat
20 player here. We have no interest in overburdening the Court.
21 It's, in fact, our interest to keep things manageable so you
22 can get reasonably quick results which will help everyone
23 resolve the case.

24 THE COURT: There was a suggestion during the
25 argument on the first motion that I essentially have in this

1 scheduling order recognition that there are two cases and
2 not one.

3 Do you want to address whether that is, in your
4 view, a fair reading of the parts that are agreed on this
5 scheduling order?

6 MR. SHAW: I will invite Ms. Rao to comment as
7 well, but I don't think that is the case. There are specific
8 discovery issues and discovery limits that would be relevant
9 between Mr. Tzathas and Alcatel-Lucent that others may not
10 have, and that is what the difference in the scheduling order
11 comes down to, so they can be accommodated without having
12 other machinations that will impact parties that won't be to
13 focused on that dispute.

14 THE COURT: And other than in response to my
15 question, did you believe you were speaking on behalf of all
16 defendants on scheduling?

17 MR. SHAW: I believe that is the case. But if
18 anyone disagrees, they can come up.

19 THE COURT: All right. First, Ms. Rao, is there
20 anything you wanted to say in response to what you just
21 heard?

22 MS. RAO: I just want to point out one thing on
23 the schedule, your Honor.

24 That the reason we came up with the separate
25 limits for our counterclaims is because we didn't want the

1 other defendants and the plaintiff to be burdened by that.

2 THE COURT: Okay. Thank you.

3 Is there anybody on this side of the room?

4 MS. JACOBS LOUDEN: Yes, your Honor. Again,
5 Karen Jacobs Louden for Cisco and Tellabs.

6 Just briefly, your Honor, on the issue of
7 contentions. I think one of the reasons we want to have
8 those early is this case involves optical network switches.
9 What is important for us to know is how it is at least
10 initially that plaintiff is reading its patent on those
11 products and what components it thinks are part of that
12 product design. So,

13 We're hoping to actually avoid some discovery
14 disputes by knowing what to look for in order to know what
15 they think is part of the accused product and what isn't.
16 That also helps on the invalidity side because we want to
17 frame invalidity contentions that go to meet the allegations
18 of infringement. Although prior art references are publicly
19 available, we need to see how they're applying their claims
20 in order to meet issue and join issue.

21 The other thing I would point out is right now
22 that no particular claims have been asserted, so without
23 contentions, we're dealing with all of the claims of the
24 patent.

25 THE COURT: What is inadequate about the standard

1 approach that I have taken, which, as I understand it, would
2 be the plaintiff's position with respect to contention
3 interrogatories?

4 MS. JACOBS LOUDEN: I think, first of all, as we
5 heard from Mr. Felix, they had a basis for -- they feel they
6 had a basis for filing suits that have something now.

7 I think what we're trying to do now is we do
8 have five defendants with distinct products, and we're a year
9 and-a-half into the case. So what we're trying to do now is,
10 to avoid disputes going forward, to have some certainty as to
11 when we're going to have those contentions so we can try to
12 manage the case a little bit better and not be getting,
13 as Mr. Shaw says, sort of a trickle of contentions and then
14 there we are at the end of the case where they don't have
15 the documents they need, we don't have contentions that are
16 meeting the infringement contentions. So we're trying to do
17 this in a more orderly way given we do have five defendants
18 with complex products that are all different.

19 THE COURT: Okay. Thank you.

20 MS. JACOBS LOUDEN: Thank you.

21 THE COURT: Is there anybody else on the defense
22 side of the room? No?

23 Is there anybody on the plaintiff side of the
24 room?

25 MR. FELIX: Yes. I would just add a couple of

1 comments, your Honor.

2 The kind of detailed contentions that the
3 defendants want from plaintiff at this point, that issue is
4 going to be present whether they do it through interrogatories
5 or whether we do it through these requirements of infringement
6 contentions.

7 The difficulty is that at this point, our infringe-
8 ment analysis is based on publicly available documents, white
9 papers, other things we are able to get from the defendants
10 website and other public documents.

11 To give those kinds of detailed contentions right
12 now, we will give them what our basis is as we know it at
13 this point, but those disputes as to whether they're detailed
14 enough, you didn't identify some particular function and some
15 piece of code, that's just not going to be available. So the
16 risk is that if we give these preliminary contentions now,
17 according to this scheduling order, as they want to have
18 happen, they -- and I have seen this done before. I have
19 dealt with this issue before -- they will limit any future
20 discovery on what has been disclosed in those contests.

21 Again, the information that they're looking for,
22 we can give it to them through interrogatories. There is no
23 difference. If they want an element-by-element analysis on
24 the products, identify the products, identify the claims, we
25 can do that with respect to contention interrogatories.

1 It's no different. The burden on them to get that information
2 is no different.

3 But the end game here is to just box us, box the
4 plaintiff in or put the plaintiff into this box where then
5 they deny any attempt to get discovery on other issues that
6 were not identified on the infringement contentions. And,

7 On the issue of motions for summary judgment, Mr.
8 Shaw mentioned that different defendants may have different
9 claim constructions, so that may affect whether to file
10 motions jointly or not.

11 Once your Honor gets past the claim construction
12 hearing and issues a claim construction order, that is the
13 only claim construction that matters. That's the only one
14 that the parties can use in terms of using as a basis for
15 motions for summary judgment.

16 THE COURT: Okay. Thank you.

17 Mr. O'Kelly, your client may be in the case. Is
18 there anything you want to say about scheduling?

19 MR. O'KELLY: No, your Honor. Thank you.

20 THE COURT: All right. We're going to take a
21 short recess and then I'll come back and give you my rulings.

22 (Brief recess taken.)

23 THE COURT: Let me give you my rulings on the
24 motion to dismiss and then on the scheduling disputes.

25 First, with respect to Mr. Tzathas's motion to

1 dismiss for lack of personal jurisdiction, the motion is
2 denied.

3 The Court is persuaded by defendant Alcatel-Lucent
4 that it has personal jurisdiction over Mr. Tzathas pursuant
5 to Federal Rule of Civil Procedure 4(k)(1)(B) which provides,
6 with a little bit of paraphrasing, serving a summons
7 establishes personal jurisdiction over a defendant who is a
8 party joined under Rule 19 and is served within a judicial
9 district of the United States and not more than 100 miles from
10 where the summons was issued.

11 It's undisputed that Mr. Tzathas has been served
12 with a summons and is less than 100 miles from this judicial
13 district.

14 The issue is then whether he is a party properly
15 joined under Federal Rule of Civil Procedure 19; and the
16 Court concludes that he is.

17 Rule 19(a)(1) makes him a person required to be
18 joined, if feasible -- and it is feasible because he is
19 subject to service of process -- his presence will not
20 deprive of the Court of subject matter jurisdiction; and,
21 additionally, in his absence, the Court cannot accord
22 complete relief among existing parties. And,

23 He claims an interest relating to the subject of
24 the action. So disposing of the action in his absence might
25 leave Alcatel-Lucent subject to a substantial risk of

1 incurring multiple or otherwise inconsistent obligations
2 because of the interest.

3 I reached this conclusion based on the dispute
4 over ownership of the patent in suit. Essentially, this case,
5 regardless of whether or not Mr. Tzathas is a party, will have
6 to resolve whether Mr. Tzathas had an ownership interest in
7 the patent in suit such that he could assign it in a manner
8 that would allow it to ultimately be asserted in this case
9 by the plaintiff against the defendant, Alcatel-Lucent, or
10 whether any rights that he had in the patent in suit were
11 already legally transferred to Alcatel-Lucent as a result
12 of agreements between Mr. Tzathas and Alcatel-Lucent. Not
13 including him, therefore, would mean that Alcatel-Lucent might
14 well have to file another lawsuit in another court which could
15 reach an inconsistent decision as to ownership.

16 The Court further agrees with Alcatel-Lucent
17 that it need not reach the issue of whether the Delaware
18 long-arm statute would apply or undertake a separate due
19 process analysis. As the Court understands it, there is no
20 constitutional challenge to the applicability of Rule
21 4(k)(1)(B) or Rule 19 as it applies to this case.

22 That's the ruling with respect to the motion to
23 dismiss.

24 On scheduling, there are the two disputes.

25 First, the Court rejects the defendants'

1 request for a precise schedule for disclosure of preliminary
2 infringement contentions.

3 I'm going to adhere to my standard approach,
4 understanding that there is a risk that I will be hit with a
5 discovery dispute arguing that the responses to contention
6 interrogatories are inadequate.

7 It is certainly true that those are difficult
8 disputes to resolve. I don't look forward to it, if it's
9 going to happen, but I'm going to trust the good judgment
10 of counsel on both sides to provide what can reasonably be
11 expected at each point in the case and to work cooperatively
12 to ensure that that is what is exchanged on both sides.
13 And if, alas, that trust turns out to be unfounded and I
14 have a dispute, I will be looking closely who has been more
15 forthcoming and more reasonable given the point in the case
16 at which the issue arises. And,

17 On the other issue, I am rejecting plaintiff's
18 proposed request to at this point limit the defendants to
19 a coordinated set of, or a coordinated invalidity summary
20 judgment motion.

21 Again, I'm going to extend my trust to counsel
22 that if they are briefing common issues and raising precisely
23 the same arguments that they will find the most effective
24 and efficient way to present that to the Court without
25 unnecessarily burdening the plaintiff or the Court.

1 So that's my rulings. The parties should
2 submit to me by Monday a cleaned up version of the proposed
3 scheduling order reflecting the rulings today, and I will
4 sign that.

5 Is there anything else we should talk about at
6 this time? First from the plaintiffs.

7 MR. FELIX: No, your Honor.

8 THE COURT: No. Mr. O'Kelly?

9 MR. O'KELLY: No, your Honor.

10 THE COURT: From any of the defendants?

11 MR. SHAW: Not from Alcatel-Lucent, your Honor.

12 THE COURT: Thank you all very much.

13 (Hearing ends at 11:05 a.m.)

14

15 I hereby certify the foregoing is a true and accurate
16 transcript from my stenographic notes in the proceeding.

17 /s Brian P. Gaffigan
18 Official Court Reporter
19 U.S. District Court
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